State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Tuesday, October 18, 2016

No. 186 People v Jose Aviles

A New York City police officer arrested Jose Aviles for driving under the influence of alcohol in December 2011 after he struck a police car that was attempting to merge into traffic in the Bronx. The officer said Aviles had a strong odor of alcohol, slurred speech, was unsteady on his feet and told him, in English, "I had a few Coronas about 15 minutes ago, about three Coronas." A breathalyzer showed his blood alcohol level was .06 percent, below the .08 level required for a per se DUI violation. The police did not offer him a physical coordination test due to a "language barrier," based on the Police Department's policy of conducting coordination tests only in English. Aviles moved to dismiss the misdemeanor charges on the ground that the policy is discriminatory and violated his right to equal protection and due process.

Criminal Court granted the motion to dismiss, saying the department's failure to administer a coordination test to Aviles "bears no rational relation to a legitimate governmental purpose" and "constitutes a denial of due process and equal protection." It said, "[B]ecause the reading on the defendant's breathalyzer test was so very low -- the reading was .06 -- there is a strong probability that the results of a physical coordination test would be exculpatory. The failure to provide the defendant -- merely because he speaks only Spanish -- with access to this potentially exculpatory evidence is a denial of his constitutional rights warranting dismissal. Here, where the breathalyzer test result is so very low, the trier of fact -- judge or jury --- is likely to have a heightened interest in seeing a video memorializing the defendant's abilities."

The Appellate Term, First Department, reversed and reinstated the charges, finding the policy of administering coordination tests only to English speaking DWI suspects did not violate the rights of non-English speakers. It relied on the Appellate Division, First Department ruling in People v Salazar (112 AD3d 5 [2013]), which said, "Although Hispanics as an ethnic group constitute a suspect class under equal protection analysis..., the practice ... is facially neutral as to ethnicity. The policy determination as to whether or not to perform physical coordination tests is based on a suspect's ability to speak and understand English, and is not based upon race, religion or national origin.... The police, of course, clearly have an interest in the reliability of coordination tests," which could be compromised by the use of a Spanish interpreter "who was not trained in conducting the test." Salazar concluded that having "qualified interpreters on call on a 24/7 basis would impose unrealistic and substantial financial and administrative burdens. The avoidance of these crushing obligations provides a rational basis for the policy."

Aviles argues, "The NYPD's policy of offering physical coordination tests only in English discriminates on the basis of national origin and is thus subject to strict scrutiny, which it cannot overcome. In addition, the policy is not rationally related to a legitimate governmental purpose, especially here, where the defendant's chemical test provided prima facie evidence that he was not intoxicated." He says there is "a crucial distinction" between Salazar, where "the defendant's BAC was .21, nearly three times the legal limit," and this case, where his BAC was "so low that there is a strong probability" a coordination test would have been exculpatory and the failure to conduct one "severely undermine[d]" his "ability to mount a defense."

For appellant Aviles: Aleksandr Livshits, Manhattan (212) 859-8524
For respondent: Bronx Assistant District Attorney Stanley R. Kaplan (718) 838-7048

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To be argued Tuesday, October 18, 2016

No. 174 Newman v RCPI Landmark Properties, LLC

George Newman, a security guard at Rockefeller Center in Manhattan, was injured when he fell while trying to climb down from a loading dock in April 2012. He had been walking with his partner through a sub-basement of the complex and followed his partner onto the platform of the loading dock, which stood about three feet above the floor. There was a wall-mounted ladder at one side of the loading dock to provide passage between the platform and the floor, but a truck was parked in front of it and Newman testified he was not aware the ladder was there. His partner climbed down from the platform on a stack of plastic milk crates, which were arranged like steps with two crates on the floor and one on top of them. Newman said he believed the crates were the "only accessible form of egress." When he stepped onto the top milk crate, the stack gave way and he fell, injuring his left knee.

Newman and his wife brought this personal injury action against the building owner, RCPI Landmark Properties, and its managing agent, Tishman Speyer Properties. The defendants moved for summary judgment dismissing the complaint, arguing Newman caused his own injury by climbing down on the milk crates instead of the ladder.

Supreme Court denied the motion to dismiss, saying, "Issues of fact exist as to whether [defendants] were negligent in allowing the crates as makeshift steps to remain and whether ... and to what extent plaintiff was also negligent." It said a jury should determine when the crates were stacked in front of the loading dock, "who put them there and what they were used for." It said the issue "is not whether or not there was any safe egress, there were these milk crates positioned as steps and I think it is a question of fact for the jury to determine whether or not the [defendants] knew that they were there being used in that way; and whether or not they put them there or ... truckers had put them there...."

The Appellate Division, First Department reversed and dismissed the suit. "It is undisputed that plaintiff ... was injured when he followed a coworker in climbing down from a loading platform by stepping onto piled up milk crates..., although defendants provided a wall-mounted ladder for use in exiting the platform," it said. "Plaintiff's choice to use the crates rather than the ladder was the sole cause of his injuries.... Whether the ladder was visible behind the trucks that were parked in the area is irrelevant, since plaintiff testified that he did not look for another means of accessing the parking level."

Newman argues that his view of the ladder was blocked by the truck, and "there is nothing in the record here to support a factual finding that Mr. Newman knew that ladders existed on the worksite, knew where the ladders were located, or even whether ladders were meant to be used to descend" from the loading dock. "Whether Mr. Newman had a choice, and thus whether he is the sole cause of his injuries, wholly depends ... on whether the wall-mounted ladder (or any other form of egress from the platform ...) was 'readily available' as that term is understood in the law. Because it cannot be said, as a matter of law, that such means were readily available to Mr. Newman, Mr. Newman cannot be said to have made a 'choice.'"

For appellant Newman: Annie E. Causey, Manhattan (212) 397-1000
For respondents RCPI et al: Glenn A. Kaminska, Albertson (516) 294-5433

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To be argued Tuesday, October 18, 2016

No. 175 People v Timothy Brewer *(papers sealed)*

Timothy Brewer was arrested on the complaints of two girls, the seven- and nine-year-old daughters of a girlfriend, who said he forced them to perform oral sex on him in a closet of his Rochester apartment in 2009. Prior to trial, the prosecution filed a "Molineux proffer" seeking permission to present testimony of the girl's mother as direct evidence of Brewer's "unique habit" of pulling his t-shirt over his head, securing it behind his neck, and receiving oral sex while he smoked crack cocaine in a closet he called the "bat cave." The proposed testimony mirrored descriptions the girls gave of their abuse, and the prosecutor argued the testimony would provide corroboration for their accounts. Supreme Court granted the application, and the mother testified that she frequently performed oral sex on Brewer in the "bat cave" while he smoked crack with his t-shirt pulled over his head. She said she also saw Brewer engage in the same conduct in the closet with another woman. Brewer took the stand and denied the girls' allegations, but acknowledged he sometimes smoked crack in the "bat cave" while receiving oral sex with his shirt over his head. Convicted of predatory sexual assault against a child and first-degree sexual abuse, Brewer was sentenced to 25 years to life in prison.

Brewer argued on appeal that admission of the mother's testimony violated the Molineux rule, which bars the use of prior bad acts or uncharged crimes to prove a defendant's propensity to commit a current crime and, if such evidence is offered for a different purpose, requires that it be more probative than prejudicial.

The Appellate Division, Fourth Department affirmed the conviction, saying, "[E]vidence of defendant's so-called 'sexual proclivities' does not constitute Molineux evidence because it was neither a crime nor a prior bad act for him to receive consensual oral sex from an adult in a closet with his T-shirt pulled over his head. The only evidence of an uncharged crime or prior bad act concerned defendant's use of crack cocaine, which was not overly prejudicial to him in the overall context of the trial given that he was not charged with any drug offenses. In any event, the evidence was not proferred only to show defendant's bad character or propensity toward crime; rather, the stated purpose of the evidence was to corroborate details of the victim's testimony. As the prosecutor argued in her summation, the victims would not likely know of defendant's sexual proclivities unless they were sexually abused by him."

Brewer argues, "The Appellate Division's conclusory holding ... that evidence of Mr. Brewer's daily use of crack cocaine and of his smoking crack cocaine while being sexually serviced orally by women do[] not constitute acts subject to the Court's prohibition against the admission of prior acts to show a defendant's propensity or character, cannot be reconciled with either the purposes of this rule or with the cases ... in which the Court ... and other appellate courts ... have held non-criminal conduct to be acts covered by the rule." He says it was error to admit the mother's testimony "since it did not go to any proper purpose other than propensity and even if it did, the prejudicial impact outweighed its probative value." The trial court "never instructed the jury that it was not to consider this inflammatory and upsetting testimony as evidence that Mr. Brewer had a propensity to commit the charged crimes."

For appellant Brewer: Brian Shiffrin, Rochester (585) 423-8290
For respondent: Monroe County Assistant District Attorney Robert J. Shoemaker (585) 753-4810

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To be argued Tuesday, October 18, 2016

No. 176 Matter of Leo

Donald William Leo was an attorney in Coram, Suffolk County, in January 2004, when he resigned from the bar while under investigation by the Grievance Committee for the Tenth Judicial District for alleged misconduct involving his escrow account. In March 2004, he sold his law practice to his son under an agreement drafted by independent counsel, an attorney who was serving on the Committee on Character and Fitness and had previously chaired the Grievance Committee. The price was set at $100,000, to be paid in annual installments of $10,000 at 6 percent interest. The agreement also provided that Leo would be paid a share of the fees due on outstanding personal injury cases and included a listing of the specific percentage he would receive in each case. At the same time, he notified his clients that he had sold his practice to his son and was moving to Tennessee, and advised them that they could retain new counsel or remain with his son. The letters did not mention disbarment. Three months later, in June 2004, the Appellate Division, Second Department accepted his resignation and disbarred him.

Leo applied for reinstatement June 2011, and the Appellate Division referred the matter to the Committee on Character and Fitness. A subcommittee questioned him at a hearing about the money he received from the sale of his practice, a total of $405,000 from 2007 through 2012, and about whether he obtained court orders fixing the amount of his fees and disbursements as required by the disciplinary rules. Leo said he did not apply for such orders because he was advised by counsel that the sums he received were contractual payments for the sale of his practice: "I was not accepting fees. I was accepting a purchase price from my son." He said he was also advised that he did have to file closing statements for personal injury cases resolved after his resignation, and that he did not have to notify any clients of his disbarment because the order was issued three months after he sold his practice, when he no longer had any clients. The subcommittee indicated it would recommend against reinstatement due to concern he used the sale to evade his duty to obtain court orders fixing his fees, but it granted him a continuance and he filed motions in five counties for orders fixing his fees and for leave to file retroactive closing statements, all of which were granted. The subcommittee then found Leo fit to practice law and "firmly" recommended reinstatement, saying he "believed that all of his actions were proper and in accordance with a detailed business plan designed by attorneys" and when he learned the "plan was flawed, he promptly and thoroughly took action to correct the situation."

The full committee recommended reinstatement be denied, saying it was "concerned that (1) your letter notifying clients that you were retiring did not conform to the rules of the Appellate Division [by telling them he was being disbarred], and (2) that your failure to seek court approval of disbursements and fees..., until after the Subcommittee had noted this irregularity..., did not evidence the present character and fitness required for reinstatement." The Appellate Division denied reinstatement in a single sentence, saying Leo "does not demonstrate the requisite fitness and character to practice law."

Leo argues the Committee on Character and Fitness erred in finding he violated the rule requiring notification to clients of disbarment, since he had no clients when it took effect, and in failing to consider that he acted under the advice of counsel when he did not seek court approval of his fees and disbursements until after the subcommittee raised the issue. He argues the Appellate Division deprived him of due process by failing to specify the reasons why it denied him reinstatement.

For appellant Leo: John F. Clennan, Ronkonkoma (631) 588-6244
For respondent Grievance Committee: Robert H. Cabble, Hauppauge (631) 231-3775

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To be argued Tuesday, October 18, 2016

No. 172 Flo & Eddie, Inc. v Sirius XM Radio, Inc.

Flo & Eddie, Inc., which claims ownership of the recordings of the 1960s rock band "The Turtles," brought this federal class action for copyright infringement against Sirius XM Radio, Inc., the largest radio and internet broadcaster in the country. Flo & Eddie, controlled by two of The Turtles' founding members, acquired the rights to the recordings in 1971 and continues to market them. Sirius XM's broadcasts include songs by The Turtles and other recordings made before February 15, 1972, when the federal Copyright Act was amended to give limited copyright protection to sound recordings. Recordings produced prior to that date are protected, if at all, by state copyright law. Flo & Eddie claims Sirius XM infringed its New York copyright by broadcasting the recordings and making internal reproductions of them to facilitate its broadcasts. It filed similar suits in California and Florida based on the laws of those states. Sirius XM says it pays royalties to the owners of musical compositions, but not to Flo & Eddie or other owners of pre-1972 sound recordings because they have no legal right to demand payment when their recordings are played. It says they are protected from having their recordings reproduced and sold by others and are compensated from the sale of their recordings, but have no "right of public performance" (i.e., the right to control when and where their recordings are played).

The U.S. District Court in the Southern District of New York denied Sirius XM's motion for summary judgment, ruling New York provides a common law right of public performance to copyright holders. "New York courts have long afforded public performance rights to holders of common law copyrights in works such as plays ... and films...," it said. "No New York case recognizing a common law copyright in sound recordings has so much as suggested that right was in some way circumscribed, or ... was less than the bundle of rights accorded to plays or musical compositions." It acknowledged that "this holding is unprecedented ... and will have significant economic consequences. Radio broadcasters -- terrestrial and satellite -- have adapted to an environment in which they do not pay royalties for broadcasting pre-1972 sound recordings. Flo and Eddie's suit threatens to upset those settled expectations."

The U.S. Court of Appeals for the Second Circuit is asking this Court to resolve the key issue in the case by answering a certified question: "Is there a right of public performance for creators of sound recordings under New York law and, if so, what is the nature and scope of that right?" The court said, "[W]hether to recognize such a right of public performance is essentially a 'public policy choice[]' appropriately resolved by a New York court. There are clear costs to recognizing a right of public performance in sound recordings.... Still, New York's interest in compensating copyright holders may perhaps outweigh the cost of making such a change. Whatever the merits of such a determination might be as a value judgment, however, it <u>is</u> a value judgment, which is for New York to make."

For appellant Sirius XM: Jonathan D. Hacker, Washington, DC (202) 383-5300
For respondent Flo & Eddie: Caitlin J. Halligan, Manhattan (212) 351-4000